See
161 U.S. 475, No 794

161-475

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 483.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

SAMUEL ZUCKER AND WILLIAM JOSEPHY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 16, 1894.

(15730.)

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1 UNITED STATE' OF AMERICA, *ss:*

The President of the United States of America to the judge of the United States district court for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said district court before you, between the United States of America and Samuel Zucker and William Josephy, a manifest error hath happened to the great damage of the said United States of America, as is said and appears by the complaint of the said Samuel Zucker and William Josephy; we being willing that such error, if any hath been, should beduly corrected in full, and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the fifteenth of November next in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the 17 day of October, in the year of our Lord one thousand eight hundred and ninety-four.

2 SAM'L H. LYMAN,
Clerk of the District Court for the Southern District of New York.

The foregoing writ is hereby allowed.

ADDISON BROWN.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 23, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The United States of America, plaintiff in error, against Samuel Zucker and William Josephy, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 14th day of November, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and nineteenth.

[SEAL.] SAML H. LYMAN, *Clerk.*

3 (Indorsed:) Sir: You will please take notice that a , of which the within is a copy, was this day duly entered in the within entitled action in the office of the clerk of the . Dated N. Y., , 189 . Yours, etc., U. S. attorney for defendant. To ,

attorney for . A copy of the within paper has been this day received at the office of Kellogg, Rose & Smith, Oct. 18, 1894. Abram J. Rose, 120 Broadway, N. Y.

(Indorsed:) 3–477. U. S. Supreme Court. United States, plaintiffs in error, versus Samuel Zucker and William Josephy, defendants in error. Writ of error. Wallace Macfarlane, United States attorney, attorney for defendant. Due service of a copy of the within is hereby admitted. New York, Oct. 18th, 1894. , attorney for plaintiff. To , attorney for plaintiff. Filed Oct. 18, 1894.

3½ United States district court for the southern district of New York.

THE UNITED STATES OF AMERICA
against
SAMUEL ZUCKER AND WILLIAM JOSEPHY.

To the above-named Defendants and each of them:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the United States attorney for said district within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York, at the city of New York, this eleventh day of April, in the year one thousand eight hundred and ninety-four.

[L. S.]

SAM'L H. LYMAN,
Clerk.

HENRY C. PLATT,
United States Attorney.

Office and post-office address, U. S. Court and Post-Office Building, Broadway and Park Row, New York.

(Indorsed:) United States of America, southern district of New York, ss. I hereby certify that on the day of .189 , at , I personally served the within summons on the within-named defendant by showing the same and delivering to and leaving with true cop thereof. U. S. marshal. I hereby depute to serve the within summons. U. S. marshal. New York, 189 .

(Indorsed:) United States district court, southern district of New York. The United States of America vs. . Summons. Edward Mitchell, United States attorney. To the defendant within named: Take notice, that upon default judgment will be taken for the sum of dollars, in money, with interest from the day of 189 , besides costs. Edward Mitchell, United States attorney.

4 District court of the United States of America for the southern district of New York.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
against
SAMUEL ZUCKER AND WILLIAM JOSEPHY, DEFENDANTS.

The plaintiffs above named, by Henry C. Platt, their attorney for the southern district of New York, complaining of the defendants, allege on information and belief:

5 For a cause of action that the defendants were, at the time and times hereinafter set forth, copartners doing business at the city of New York under the firm name of Zucker & Josephy, and that the said defendants are inhabitants of the southern district of New York.

That on or about the 7 day of Dec., in the year one thousand eight hundred and ninety 1, certain goods, wares, and merchandise, to wit: 2 cases artificial flowers, viz, case 831, line 472; case 829, line 472, were imported and brought into the United States, to wit, into the port of New York, in the collection district of the city of New York, from Paris, a foreign port or place, by way of , in a ship or vessel called the La Bretagne, and were, when so imported, subject to the payment of duties to the United States.

That afterwards, to wit, on the 7 day of Dec., in the year one thousand eight hundred and ninety-one, at the office of the collector of the said district, an entry, in writing, of the said goods, wares, and merchandise, purporting to be duly signed, was made with the said collector by the defendants, the owners, importers, and consignees thereof, and a duly certified invoice thereof there was then and there produced to the said collector, a paper before the collector or his deputy, purporting to show the actual cost of said merchandise purchased, together with a declaration accompanying said invoice and entry, which entry and declaration were thereupon then and there signed and verified in manner and form as required by law.

That the said goods, wares, and merchandise, of which said entry was made and invoice produced as aforesaid, were obtained by purchase, were then and there subject to the payment of duty, and were then and there entered as aforesaid by the said defendant as the owners, importers, and consignees thereof, by means of the said entry, invoice, affidavit, letter, and paper, which were false and fraudulent in this, that said invoice did not contain a true statement of the actual cost of said goods, wares, and merchandise, and that the actual cost of said goods, wares, and merchandise was greater than the amounts stated therein as the actual cost

6 thereof, as defendants well knew by means of written statements which were then and there false in this, that in said declaration the said defendants, owners, and consignees, as aforesaid, stated that the invoice of said goods, wares, and merchandise produced as aforesaid, and the declaration therein, were in all respects true, when in truth and fact they were false in each and every particular, as defendants well knew, by means of the following practice, which was then and there false and fraudulent in this, that by means of the following appliance, which was then and there false and fraudulent in this, that who was guilty of the following willful act, to wit: That said defendants wilfully and

wrongfully concealed and suppressed the actual cost of said goods, wares, and merchandise in said invoice produced to said collector, as aforesaid, and that by means of the premises the United States have been deprived of the lawful duties, or a portion thereof, accruing upon the said merchandise, and that the said frauds and false statements and papers, acts, and omissions relate to the whole of the merchandise imported, as aforesaid.

7

That on or about the 7 day of Dec., 1891, the said defendant, the owner, importer, consignee, or agent of the said merchandise, made an entry, as aforesaid, of said merchandise, which was then and there obtained by purchase, and was subject to duties, and had been imported into the United States within said district of the city of New York from Paris, a foreign port or place by way of , in the ship or vessel La Bretagne, by means of a fraudulent and false invoice, affidavit, letter, and paper, and by means of certain false statements, written and verbal, and by means of certain other false and fraudulent practices and appliances, and ha' been guilty of certain willful acts and omissions, by means whereof the United States have been deprived of the lawful duties or a portion thereof accruing upon the said goods, wares, and merchandise, or a portion thereof, embraced and referred to in such invoice, affidavit, letter, paper, and statement, and affected by such acts and omissions.

Whereby and by force of the statute of the United States in such case made and provided, to wit, the ninth section of the act of Congress approved June 10th, 1890, the value of the merchandise, hereinbefore referred to, to be recovered from the said defendant, being the whole of the merchandise contained in the cases and packages containing the particular article and articles of merchandise to which such fraud and false paper and statement related, became and is forfeited to the United States.

That the value of the said merchandise was $234.36.

8

And thereupon, and by reason of all and singular the premises aforesaid, the said attorney for the United States, on behalf of the United States, demands judgment against said defendants for the sum of said value so forfeited to wit: Two hundred thirty-four and $\frac{36}{100}$ dollars, together with interest from the 7 day of Dec., 1891, and the costs of this action.

HENRY C. PLATT,
U. S. Attorney.

8½

(Indorsed:) U. S. district court, southern district of New York. The United States of America vs. Samuel Zucker et al. Complaint, Henry C. Platt, United States attorney, attorney for plaintiffs. Due service of a copy of the within complaint is hereby admitted. New York, 189 . , attorney for defendant. To , attorney for defendant.

8¾

United States district court, southern district of New York.

THE UNITED STATES OF AMERICA
agst.
SAMUEL ZUCKER AND WILLIAM JOSEPHY. } Notice of appearance.

SIR: Please to take notice that the defendants above named appear in this action, and that we are retained as attorney for them therein, and

demand that a copy of the complaint and all papers in this action be served on us at our office, number 120 Broadway, N. Y.

Yours, &c.,

KELLOGG, ROSE & SMITH,
Attorneys for Defendants.

Oct. 9, 1893.

To EDWD. MITCHELL, Esq.,
U. S. Plaintiff's Attorney.

(Indorsed:) U. S. district court, southern district of N. Y., 3–476. The United States, agst. Samuel Zucker & others. Notice of appearance of defendants. Kellogg, Rose & Smith, attorney for defendant. Due service of a notice, of which the within is a copy, admitted this day of , 189 . , plaintiff's attorney. Filed Oct. 9, 1893.

9 United States district court, southern district of New York.

UNITED STATES
against
SAMUEL ZUCKER AND ANOTHER.

The above-named defendants for their answer to the complaint of the plaintiff herein:

First. They admit that at the times mentioned in said complaint the defendants were, and now are, copartners, under the firm name of Zucker & Josephy, and that the defendants are inhabitants of the southern district of New York, as stated and alleged in the said complaint.

Second. They admit that on or about the time set forth in the said complaint certain goods, wares, and merchandise were imported and brought into the United States, to wit, into the port of New York, in the collection district of New York; that they have no knowledge or information sufficient to form a belief as to whether the complaint correctly sets forth the quantities and kinds of goods so imported at such times, or the place from which the same was brought or shipped, or the vessel by which the same was brought into the United States, and they therefore deny the allegations of said complaint in that behalf.

Third. And defendants further answering deny each and every other allegation contained in said complaint.

10 Fourth. Defendants for a separate and distinct answer to the said complaint allege that the value of the goods in the said complaint mentioned did not, nor did any part thereof, become forfeited in manner or form as in said complaint in that behalf alleged.

Fifth. Defendants for a further separate and distinct answer to the said complaint allege that this action is not brought against the person making the entry of the goods, wares, and merchandise in said cause of action specified, and therefore the plaintiff is not entitled to maintain this action.

KELLOGG, ROSE & SMITH,
Attys. for Defts.

(Endorsed:) Answer filed Oct. 17, 1894.

11 U. S. district court, southern district of N. Y.

THE UNITED STATES
against
SAMUEL ZUCKER ET AL. } Notice of trial.

Please to take notice that the issue of fact in this action will be brought to trial and a motion made to dismiss the complaint at a stated term of this court, appointed to be held in and for the district court, at New York, in the said district, on the 17th day of April, 1894, at eleven o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated the 10 day of April, 1894.

Yours, &c.,

KELLOGG, ROSE & SMITH,
Attorney for Defts.

To Hon. HENRY C. PLATT,
U. S. Attorney, Attorney for Plff.

(Endorsed:) Notice of trial. Filed Oct. 17, 1894.

12 United States district court, southern district of New York.

UNITED STATES OF AMERICA
against
SAMUEL ZUCKER AND WILLIAM JOSEPHY. } Postea.

This action having been brought to trial at a stated term of this court held on the 20th day of April, 1894, before Hon. Addison Brown, district judge, and a jury, and the jury having found a verdict for the defendants, and the stay of the entry of judgment granted at that time having expired, it is, on motion of Kellogg, Rose & Smith, attorneys for the defendants,

Ordered and adjudged that the complaint in this action be, and the same hereby is, dismissed.

SAM'L H. LYMAN, *Clerk.*

(Endorsed:) Judgment roll dismissing complaint. Filed Oct. 17, 1894.

13 United States district court, southern district of New York.

THE UNITED STATES OF AMERICA
vs.
SAMUEL ZUCKER AND WILLIAM JOSEPHY. }

Plaintiffs and appellants' bill of exceptions.

Afterwards, to wit, on the 20th day of April, 1894, at a stated term of this court, the above-entitled cause came on for trial before the Hon. Addison Brown, district judge, and a jury. Henry C. Platt, U. S. attorney, and Charles Duane Baker, assistant U. S. attorney, appeared for the plaintiffs, and Abram J. Rose appeared for the defendants.

Whereupon an application was made to the court by counsel for the plaintiffs for a postponement of the trial of said action, the grounds of

which application for such postponement were set forth in an affidavit then and there presented to the court, whereof the following is a copy:

"SOUTHERN DISTRICT OF NEW YORK, *ss:*

"CHARLES DUANE BAKER, being duly sworn, deposes and says:

1. "That he is an assistant United States attorney in and for the
14 southern district of New York, and that as such assistant United States attorney he has charge of the above-entitled action in behalf of the plaintiffs.

2. "That this action was commenced on the 11th day of April, 1894, and that on the said 11th day of April, 1894, the defendants appeared herein by Kellogg, Rose and Smith, their attorneys, who demanded a copy of the complaint, and of all papers in the action to be served upon said attorneys at their office at the city of New York. That on the said 11th day of April, 1894, a copy of the complaint in said action was duly served upon the attorneys for the defendants.

3. "That said action was brought against said defendants to recover the sum of $234.36, value of certain cases of goods, wares, and merchandise, more particularly described in said complaint alleged to have been entered into the collection district of the port of New York, by means of certain fraudulent invoices, affidavits, letters, papers, false statements, written and oral, and by means of certain false and fraudulent practices and appliances, and by means of certain wilful acts or omissions whereby the United States were deprived of the lawful duties or of some portion thereof accruing upon such merchandise, said action being brought under and pursuant to section 9 of the act of Congress approved June 10, 1890, and known as the customs administrative act of 1890.

4. "That on the said 11th day of April, 1894, an answer herein by said defendants was duly served, denying all the material allegations in said complaint.

15 5. "That deponent is informed and verily believes that certain witnesses, all of whom are domiciled in and are residents of the Republic of France, and are not in the said southern district of New York, nor within 100 miles of this court, and who can testify in support of the issues raised by the complaint in said action, in behalf of the United States, the plaintiffs; and that the testimony of all of said witnesses is material and necessary, in order to enable the plaintiffs to prove the allegation in said complaint contained, and that without the testimony of said witnesses the plaintiffs cannot safely proceed to the trial of the issues in said action.

6. "That deponent is informed and verily believes that under the laws of Republic of France the attendance of a witness before a commissioner appointed by a foreign court cannot be compelled, and therefore a letter rogatory is necessary for the plaintiffs in the premises to obtain the attendance and testimony of said witnesses in order that the same may be used in behalf of the plaintiffs on the trial of said action; and deponent asks that an order be made by this court directing that letters rogatory in this action be issued to the Tribunal de la Premiere Instance at Paris, France, in the premises, and that the trial of this action be postponed until the

execution of said letters rogatory and the return thereof to this court. Sworn to before me this 20th day of April, 1894. Charles Duane Baker. Gilbert E. Rogers, notary public, Kings and N. Y. counties."

16 Said application for postponement was opposed by counsel for the defendants, on the ground that the testimony proposed to be taken, if taken under a letter rogatory, would be inadmissible on the trial of the action and in violation of the constitutional rights of the defendants, and that to postpone the trial to take such testimony or to issue letters rogatory would be useless. It was expressly understood and stated by counsel on behalf of defendants that no objection was made to the application for a postponement of the trial of said action, on the ground that such application was not made in due time, or that the plaintiffs had been guilty of any laches in the premises.

"The COURT. The application to postpone, I understand, is made by the district attorney solely for the purpose of obtaining the testimony of these foreign witnesses.

"Mr. BAKER. Yes, these foreign witnesses. We have no other evidence except that to be obtained from them.

"The COURT. You have no testimony in this country which you hope to obtain by witnesses to be present on the trial?

"Mr. BAKER. There are none in this country by whom we can prove the issue in this case.

"The COURT. You do not expect to procure the presence of any such witnesses?

"Mr. BAKER. No.

"The COURT. The question, then, is solely whether a verdict could be sustained upon the testimony of foreign witnesses given on commission or on letters rogatory.

17 "Mr. BAKER. On that testimony we might succeed; without that testimony we cannot succeed in the action.

"The COURT. For the purpose of enabling this question to be determined by the appellate court, before the expense and trouble of taking testimony by letters rogatory shall be incurred, I think I shall rule, for that purpose, that the trial shall proceed, and decline to grant an adjournment, in view of the decision of the Supreme Court in the case of the United States vs. Boyd. By that decision, as I understand it, an action, though civil in form, for the purpose of obtaining a forfeiture of property to the United States, or condemnation of property forfeited by law to the United States, or the forfeiture of the value of such property, is in substance a criminal case, and that the material rights of the party to such a case are to be determined by the rules of law applicable to criminal cases. For the present, therefore, I shall follow what I understand to be the logical result of that decision, and hold that this action, though civil in form, is in substance a criminal case, and therefore by the provisions of the Constitution of the United States the defendants will be entitled to confront the witnesses against him and have them present in court at the trial. Therefore, testimony taken under letters rogatory in a foreign country would not be admissible. I therefore deny the motion.

"Mr. BAKER. I except to the ruling of your honor on each and every ground stated.

18 "The COURT. You can call a jury.

"Mr. BAKER. I ask for a postponement on the ground stated.

"The COURT. The postponement is denied, on the ground that the court has no power to receive evidence taken under letters rogatory in a foreign country."

A jury was thereupon duly empaneled and sworn.

"Mr. BAKER. We have no testimony here on behalf of the plaintiff to proceed on this trial.

"The COURT. And you do not expect to be able to produce any testimony by witnesses to be called here?

"Mr. BAKER. No.

"Mr. ROSE. I move that the court direct the jury to dismiss the complaint.

"The COURT. A verdict will be directed for the defendant.

"Mr. BAKER. To that ruling I except."

The jury therefore, by direction of the court, rendered a verdict for the defendant.

"Mr. BAKER. I would ask a stay of the entry of judgment in this case, and that we have thirty days in which to prepare and serve a bill of exceptions."

Said stay and leave to prepare a bill of exception' were granted.

It is hereby stipulated that the foregoing shall constitute the bill of exceptions in the above action.

Whereas the exceptions, matters, and things aforesaid would not
19 appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of the said plaintiffs by their counsel.

It is ordered that the same be filed as a part of the record herein, with like force and effect as if the above had been reduced to writing and signed and filed before the case was given to the jury as of the 20th day of April, 1894.

ADDISON BROWN.

KELLOGG, ROSE & SMITH,
Attys. for Deft.

(Endorsed:) Plffs. bill of exceptions. Filed Oct. 12, 1894.

20 United States district court, southern district of New York.

THE UNITED STATES OF AMERICA
vs.
SAMUEL ZUCKER AND WILLIAM Josephy.

Of the October term, in the year of our Lord one thousand eight hundred and ninety-three.

Afterwards, to wit, on the last Tuesday of October in this same term, before the judge of the United States district court for the southern district of New York, at the United States court and post-office building in the city of New York, come the said plaintiffs in error, by their attorney, Wallace Macfarlane, United States attorney for the southern district of New York, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The court erred in denying the motion of the plaintiffs in error for a postponement of the trial of said action, which postponement was asked

for on the ground that certain witnesses residing in France, and without whose testimony plaintiffs in error could not safely proceed to trial and whose presence at the trial of said action could not be obtained, and asking that letters rogatory might issue for taking the depositions of said
21 witnesses, said motion being denied upon the ground that said action, though civil in form, was in substance a criminal case, and therefore by the provisions of the Constitution of the United States the defendants would be entitled to confront the witnesses against them and have them present in court at the trial, their testimony taken under letters rogatory in a foreign country would not be admissible.

2. The court erred in directing a verdict for the defendants in error.

3. And the court erred, also, in this, that by the record it appears that the judgment aforesaid given was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought not to have been given for the said defendants in error, and the said plaintiffs in error therefore pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment.

WALLACE MACFARLANE,
United States Attorney, Southern Dist., N. Y.

(Endorsed:) Assignment of errors. Filed Oct. 18, 1894.

22 UNITED STATES OF AMERICA, *ss:*

To Samuel Zucker and William Josephy, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fifteenth of November next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the southern district of New York, wherein the United States of America are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 17th day of October, in the year of our Lord one thousand eight hundred and ninety-four.

Dated October 17, 1894.

ADDISON BROWN.

(Endorsed:) Citation. Filed Oct. 18, 1894.

23 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, plaintiff in error, *ag'st* SAMUEL ZUCKER AND WILLIAM JOSEPHY, defendants in error.	Joinder in error.

And afterwards, to wit, on the 15 day of November, in said term, the said defendants in error, by Abram J. Rose, one of their attorneys, comes

here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

KELLOGG, ROSE & SMITH,
Attorneys for Defendants in Error.

24 (Indorsed:) United States Supreme Court. The United States' plaintiff in error, vs. Samuel Zucker & ano., defendants in error. Joinder in error. Kellogg, Rose & Smith, attorneys for the defendants in error. Due service of a copy of the within joinder in error is hereby admitted this 14 day of Nov., 1894. Wallace Macfarlane, attorney for plaintiff in error. To , attorney for plaintiff in error. Filed Nov. 14, 1894.

(Indorsed:) District court of the United States for the southern district of New York. The United States, plffs. in error, vs. Samuel Zucker and William Josephy, defts. in error. Return.

(Indorsement on cover:) Case No. 15730. Term No. 483. The United States, plaintiff in error, vs. Samuel Zucker & William Josephy. S. New York D. C. U. S. Filed November 16, 1894.